Supreme Court, U.S.
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No. 09-854

In the Supreme Court of the United States

FORTIS INSURANCE COMPANY,

Petitioner,

v.

JEROME MITCHELL, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

In an effort to persuade the Court that the end result—a $10,000,000 punitive award in a case in which the actual damages were $150,000—is justified regardless of the procedural and substantive errors committed in reaching it, respondent accuses us of "misstat[ing] key facts and omit[ting] others." Opp. 7. But the parties' differences as to the facts have no bearing on the first question presented, and only minor relevance to the second.

In any event, those differences are less material than respondent suggests. Most significantly, respondent points to no evidence that Fortis ***knew*** that the key medical record was misdated, instead contending that Fortis "had ample means to confirm the correct date but chose not to undertake that task." Opp. 8. But we already have acknowledged that, with the benefit of hindsight, Fortis's failure to verify the accuracy of the medical record "'merits no praise.'" Pet. 23-24 (quoting *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003)). That perfectly typical aspect of all punitive damages cases hardly means that this case is "a poor vehicle for review of any conflicts that might exist over review of punitive damage awards," as respondent insists (Opp. 13).

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[1] The Rule 29.6 Statement in the Petition remains accurate.

ARGUMENT

I. The South Carolina Supreme Court's Use Of Potential Harm Warrants Review And Reversal.

A. Fortis lacked notice that the $1,081,189 figure would be employed to justify the amount of punitive damages.

Respondent does not deny that (i) he expressly told the jury that the purpose of the $1,081,189 figure was to show Fortis's motive; (ii) the court instructed the jury that the punitive damages must bear a reasonable relationship to the ***actual harm***; (iii) he argued that the punitive damages should be a percentage of Fortis's wealth; and (iv) the jury's punitive award was exactly 100 times the compensatory award and within rounding distance of one of the wealth-based measures he had proposed. Respondent nevertheless contends that Fortis had fair notice that the $1,081,189 figure could be the basis for setting the punitive damages. He can do so only by distorting the record.

First, he notes that the $1,081,189 figure was admitted to show Fortis's motive to rescind his policy. Opp. 15 (citing Pet. App. 63a-64a). But the very page of the trial court's ruling he cites confirms that the evidence was not admitted or used at trial to show "potential harm." See Pet. App. 64a ("Plaintiff did not argue that Fortis would have had to pay the entire [$1,081,189] under the policy. To the contrary, Plaintiff acknowledged that there were substantial co-payment obligations.").

Second, respondent's reliance on the admission of Dr. Htay's testimony (Opp. 15-16) is even more misguided. Dr. Htay testified that, if left untreated,

respondent's HIV would result in his death. The wrongful-death theory of "potential harm" was not invoked by the South Carolina Supreme Court and is therefore irrelevant to our contention that Fortis lacked fair notice that the $1,081,189 figure would be used to support the punitive award.

Third, respondent asserts that because Fortis did not seek a limiting instruction, it "simply has no basis to say that the jury's award for punitive damages was not partially predicated on" the $1,081,189 figure. Opp. 17. But no such instruction was necessary given his own closing argument and the instruction that the court did give, which expressly informed the jury that the punitive damages had to be reasonably related to the ***actual harm***.

Fourth, respondent mischaracterizes his closing, asserting that he "specifically argued that punitive damages were available to take away Fortis's incentive to avoid paying $1.004 million in medical management costs, potential harms that Mitchell faced." Opp. 17. What he actually said was that when "deciding whether Fortis acted willfully in reckless disregard, one of the things that you can also consider ... is whether Fortis had a financial incentive." R1532.

Fifth, respondent argues that the trial court "specifically considered various potential harms in evaluating whether the jury's verdict was excessive." Opp. 17. Of course, what the trial court did post-trial is irrelevant to our argument that, ***at the time of trial***, Fortis lacked notice that the $1,081,189 figure would be dubbed "potential harm" and used as the denominator of the punitive damages/harm ratio. In any event, the trial court did not treat the $1,081,189 figure as potential harm. Instead, it relied on the

policy's $6,000,000 lifetime cap (see Pet. App. 48a-49a)—a measure rejected by the South Carolina Supreme Court as unduly speculative.

B. The issue presented was fully preserved.

Respondent's contention that the procedural due process issue presented here was neither pressed nor passed upon in the South Carolina Supreme Court (Opp. 18-21) is misguided. Fortis had no inkling that the $1,081,189 figure would be used to support the amount of punitive damages until it received the South Carolina Supreme Court's decision.[2] Accordingly, in challenging the trial court's order upholding the punitive damages, it had no reason to argue that reliance on the $1,081,189 figure would violate due process. After receiving the decision, Fortis did raise the due process argument in its rehearing petition (Rehearing Petition 25-27; Reply 9-12), thereby preserving it for this Court's review. See *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.3 (1996).

Respondent suggests that Fortis could have raised a procedural due process challenge to the trial court's reliance on the $6,000,000 lifetime cap. Opp. 19-20. But the problem with the $6,000,000 figure was that it was absurdly speculative as a measure of potential harm, and Fortis attacked it on that basis. There was no dispute, however, that it was the accurate life-time cap. By contrast, the $1,081,189 figure is a demonstrably invalid measure of the future insurance benefits that would have been due respondent had the policy not been reinstated. But because

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[2] In his appellate brief (at 36), respondent invoked two—and only two—measures of potential harm: "Six million dollar lifetime medical benefits; Three million dollars for the [wrongful] death of a twelve year old."

respondent never suggested that this figure represented potential harm, Fortis had no reason to refute it. If the trial court had nonetheless relied on that figure to support the amount of punitive damages, Fortis would have raised a procedural due process objection in the South Carolina Supreme Court. Because the trial court did not do so, Fortis instead sensibly focused its fire on the trial court's reliance on the $6,000,000 figure.

C. The issue is a recurring one that has divided the lower courts.

Respondent contends that "the lower courts are neither conflicted nor confused about when potential-harm evidence may be considered on appeal in the course of excessiveness review." Opp. 24. In so framing the point, he ignores that there is confusion in ***this*** Court. As we discussed in the petition (at 12-13), in *TXO* a three-Justice plurality invoked potential harm to justify the $10,000,000 punitive award, while Justice Kennedy in a concurring opinion and Justice O'Connor in a dissenting opinion for herself and two other Justices rejected the plurality's reliance on potential harm as a post hoc rationalization. Since then, Justice Breyer has cited Justice Kennedy's concurrence for the proposition that "courts properly tend to judge the rationality of judicial actions in terms of the reasons that were given, and the facts that were before the court, not those that might have been given on the basis of some conceivable set of facts." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 593-594 (1996) (Breyer, J., concurring) (citation omitted). The division in this Court on an issue that so frequently recurs is reason enough to grant certiorari.

In any event, respondent's suggestion that the lower courts are not in disarray is mistaken.

First, respondent misunderstands *Security Title Agency, Inc.* v. *Pope*, 200 P.3d 977 (Ariz. Ct. App. 2008). The *Pope* court refused to consider the potential harm to the plaintiff had defendants' plan succeeded in its entirety because "[n]o evidence was presented" of that amount. *Id.* at 1000. The figure the jury rejected was a measure of ***actual*** harm. See *id.* at 993. In opposing that measure of actual harm at trial, the defendants had no reason to think that the plaintiff would argue post-verdict that it also was a measure of potential harm. Accordingly, the decision conflicts with that of the South Carolina Supreme Court.

Respondent also misunderstands *Goddard* v. *Farmers Insurance Co.*, 179 P.3d 645 (Or. 2008). True, the jury in the underlying case did not award the plaintiff the full amount of compensatory damages she requested, but the Oregon Supreme Court's rationale for refusing to treat that amount as "potential harm" was broader. It held squarely that "the actual and potential harm suffered by a plaintiff is a fact to be decided by the jury." *Id.* at 666. The South Carolina Supreme Court's belief that it could support a punitive award on the basis of a potential-harm theory not presented to the jury is irreconcilable with that holding.

Respondent is equally mistaken about the three cases on the other side of the divide: *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir. 2001); *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364 (La. Ct. App. 2001); and *Bennett* v. *Reynolds*, 242 S.W.3d 866 (Tex. Ct. App. 2007).

In *Tronzo*, the Federal Circuit did not merely find the excessiveness objection waived; rather, in deciding not to exercise its discretion to consider the waived argument, the court reasoned that "competent evidence of damages may have existed, but was never introduced" and that the potential harm therefore "may have been much higher than what was actually awarded" by the jury. 236 F.3d at 1350. That rationale squarely conflicts with *Pope* and *Goddard*.

Respondent asserts that it is not clear from the opinion in *New Orleans Train Car* that "the [potential-harm] rationale itself, or evidence of potential harm, was never presented to, or considered by, the jury." Opp. 23. Be that as it may, the court's holding that *TXO* authorizes courts to justify disproportionate punitive awards on the basis of measures of potential harm not found by the jury (795 So. 2d at 384) is broad and conflicts with *Pope* and *Goddard*.

Finally, respondent does not dispute that in *Bennett* the court scoured the record in search of "a baseline of potential harm" that "the jury did not find." 242 S.W.3d at 905 & n.46. Instead, he points out that the *Bennett* court selected as its measure of potential harm the defendant's assertion that ***his*** mental distress was $500,000. That kind of post-hoc reliance on evidence introduced for an entirely different purpose is precisely what happened here and precisely what *Pope* and *Goddard* reject.

II. The South Carolina Supreme Court's Application Of The *BMW* Guideposts Warrants Review And Reversal.

Respondent misunderstands our point entirely. We are not asking this Court to grant review so that it can "jettison its current framework" (Opp. 27).

Our point instead is that many lower courts—including the court below—have misapplied the "current framework," thereby sapping its "constraining power to protect against serious and capricious deprivations" of property (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)). What is needed is not a "jettison[ing]" of the framework, but clearer guidance as to how the framework should be applied.

Respondent cannot deny that the $10,000,000 exaction approved by the South Carolina Supreme Court is higher than the amounts deemed to be the constitutional maximum in cases involving materially more egregious conduct (see Pet. 25 n.13) and is $8,500,000 more than the highest punitive award ever permitted in an insurance bad-faith case in South Carolina (see Pet. 25). He also does not deny that the punitive award exceeds by $9,970,000 the maximum fine for violations of South Carolina's unfair claims handling statute. He says that the exaction is defensible because it "properly accomplishes the State's legitimate interest in punishment and deterrence" (Opp. 30; see also Opp. 25, 27). But that is precisely the kind of untethered rationale that this Court has consistently rejected. See, *e.g.*, *BMW*, 517 U.S. at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

This case thus well illustrates that if the objectives of eliminating the "stark unpredictability" of punitive awards (*Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2625 (2008)) and ensuring "the uniform general treatment of similarly situated persons that is the essence of law itself" (*BMW*, 517 U.S. at 587

(Breyer, J., concurring)) are to be achieved, further guidance on the proper application of the guideposts is needed.

A. Reprehensibility

Respondent suggests that we are asking the Court "to reconsider reprehensibility's status as the most important indicium of reasonableness." Opp. 27 (internal quotation marks omitted). He is mistaken. Our beef is not with this guidepost's importance, but with the way that the South Carolina Supreme Court and other courts have applied it. It is perfectly fine to inquire whether a defendant's conduct entails the various indicia of reprehensibility identified in *State Farm*.[3] But it is not sufficient to end the inquiry there. Even if a defendant's conduct involved most of *State Farm*'s reprehensibility factors, the ultimate inquiry remains whether "the extraordinary size of the [punitive award] is explained by the extraordinary wrongfulness of the defendant's behavior, measured by historical or community standards." *BMW*, 517 U.S. at 595 (Breyer, J., concurring). And that inquiry cannot be conducted in a vacuum, but instead must take into account the magnitude of punishments permitted in cases involving both similar and more egregious conduct.[4]

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[3] Notably, respondent does not deny that there is a raging split over the meaning of the "repeated misconduct" factor. See Pet. 23 n.12.

[4] Respondent equates this inquiry with "a race to the bottom" in which the fact that "everyone else is doing it" is a justification for concluding that the conduct is not reprehensible. Opp. 28. Although we ***do*** believe that compliance with industry custom is a mitigating factor, our point here is that the defendant's conduct must be compared with the conduct in other cases to

Respondent asserts that this comparison is already undertaken as part of "the independent comparability guidepost," by which he means the third guidepost. Opp. 27. That may be so under the South Carolina Supreme Court's mistaken understanding of that guidepost, in which the focus is on the disparity between the punitive exaction at issue and punitive awards in prior cases. But the proper focus of the third guidepost is on ***legislatively established penalties*** for comparable conduct. See *BMW*, 517 U.S. at 583 ("a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue") (internal quotation marks omitted); *State Farm*, 538 U.S. at 428 ("The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for [violations of Utah's unfair claims handling practices act]."). In any event, the South Carolina Supreme Court never sought to explain why Fortis's conduct was so extraordinarily wrongful as to warrant a punishment 6.67 times the highest prior bad-faith punitive award.

Respondent also contends that comparing the conduct at issue with that in other cases would "requir[e] mini-trials in which juries hear evidence concerning the conduct of others." Opp. 28. Not so. Just as with the third guidepost's inquiry into fines for comparable conduct, this part of the reprehensibility inquiry can and should be performed by reviewing courts, not juries.

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ensure that the punishments for like acts are reasonably consistent.

B. Ratio

Respondent points out that this Court repeatedly has said that no single ratio marks the constitutional line in every case and asserts that accordingly "no conflict can exist simply by virtue of different outcomes." Opp. 29-30. But he cannot deny that numerous courts have interpreted *State Farm* as creating a presumption in favor of a 1:1 ratio when the denominator of the ratio is "substantial"—even in cases of highly reprehensible conduct—while numerous other courts have construed *State Farm* as immunizing any ratio that is less than double digits.

Contrary to respondent's assertion, we are not arguing "in favor of a mechanical application of a 1:1 ratio without consideration of this Court's teachings that some wrongs are more blameworthy than others." Opp. 26 n.6. If the denominator in this case were limited to respondent's $150,000 in actual damages, a ratio of 4:1 might well mark the constitutional line. See *State Farm*, 538 U.S. at 425. But given the enormous size of the denominator selected by the court below, deviating from the 1:1 line based simply on the assertion that the conduct is bad enough to warrant it (Pet. App. 24a) directly implicates this Court's concerns about "[punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution" (*Exxon Shipping*, 128 S. Ct. at 2633).

C. Legislatively established penalties for comparable conduct

Respondent dismisses the confusion in the lower courts regarding the third guidepost by caricaturing our position. We do not contend that punitive awards "must be remitted in each and every case

based on comparable civil or criminal penalties." Opp. 30-31. Our point is that the South Carolina Supreme Court—along with several other courts—has misapplied that guidepost by flatly refusing to consider the legislatively established penalties for the conduct at issue on the ground that they are too low. See Pet. 30-31.

Because it is not our position that legislatively established fines serve as the constitutional limit on punitive damages, respondent is mistaken in asserting that comparing the punitive damages to such fines "would render consideration of the first two guideposts a futile exercise in many, if not most, cases" (Opp. 31). By contrast, the South Carolina Supreme Court's approach would eliminate the third guidepost from consideration whenever it would actually point to a finding of excessiveness.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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